

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
NORTHERN DIVISION

WASHINGTON COUNTY, NORTH  
CAROLINA and BEAUFORT COUNTY,  
NORTH CAROLINA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE  
NAVY; GORDON R. ENGLAND, in his  
official capacity as Secretary of the Navy, and  
B.J. PENN, in his official  
capacity as Assistant Secretary of the Navy for  
Installations and Environment,

Defendants.

Civil No. 2:04-CV-3-BO(2)

THE NATIONAL AUDUBON SOCIETY,  
NORTH CAROLINA WILDLIFE  
FEDERATION, and DEFENDERS OF  
WILDLIFE,

Plaintiffs,

v.

DEPARTMENT OF THE NAVY; GORDON  
R. ENGLAND, Secretary of the Navy;  
B.J. PENN, Assistant  
Secretary of the Navy for Installations and  
Environment; R.M. FLANAGAN,  
Major General, U.S. Marine Corps,  
Commanding General, Marine Corps Air  
Station, Cherry Point,

Defendants.

Civil No. 2:04-CV-2-BO(2)

**MOTION AND MEMORANDUM OF LAW TO STAY, SUSPEND OR MODIFY**

**PERMANENT INJUNCTION PENDING APPEAL**

Defendants, United States Department of the Navy, et al<sup>1</sup> (herein “Navy”), represented by the undersigned counsel, hereby file this Motion and Memorandum of Law to Stay, Suspend or Modify Permanent Injunction Pending Appeal.<sup>2</sup>

### **Statement of the Case**

On February 18, 2005, the Court issued an order granting summary judgment to Plaintiffs, and issuing a Permanent Injunction, prohibiting the defendants from “taking any further activity associated with the planning, development, or construction of an OLF in Washington and Beaufort Counties without first complying with its obligations under NEPA.” Simultaneously with filing this Motion, the Navy is filing a Notice of Appeal. Now, pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure and Rule 62(c) of the Federal Rules of Civil Procedure, the defendants are filing this Motion to Stay, Suspend or Modify Permanent Injunction Pending Appeal. The facts of this case are well-known to this Court, and will not be revisited in detail here.

This Motion is straightforward. The Navy contends that the Permanent Injunction should be stayed, suspended or modified pending appeal. Specifically, the Court should grant one of two alternative remedies. First, the court should simply stay the entire Permanent Injunction pending appeal. In the alternative, the Court should modify the injunction to allow the

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<sup>1</sup> It should be noted that the Navy has substituted B.J. Penn for Wayne Army in the caption of these cases, since B.J. Penn is now the Assistant Secretary of the Navy for Installations and Environment. See Rule 25(d)(1) Federal Rules of Civil Procedure.

<sup>2</sup>The defendants have simultaneously filed a protective Notice of Appeal. As with all cases in which the United States (or an agency or officer thereof) is a party, the Solicitor General makes the ultimate decision whether or not to proceed in the Court of Appeals. The Solicitor General has not yet made such a determination in this case. If the Solicitor General ultimately

Navy to continue certain specific activities that cause no immediate harm to the Plaintiffs or the environment.

If the Permanent Injunction is only modified (or partially stayed) pending appeal, the remainder of the injunction would remain in place pending appeal.<sup>3</sup> The harm to the Navy has been described in detail in other pleadings before this court. As explained by Admiral Fallon in his declaration previously submitted to the Court,<sup>4</sup> “Every day that the Navy is prevented from moving forward with an Outlying Landing Field (OLF) in Washington County has an impact on Naval aviation readiness.” (Admiral Fallon Declaration at paragraph 6). The current training at NALF Fentress is “less than optimal” (*Id.* at paragraph 16.) As Admiral Fallon went on to point out, “Better, more realistic training, such as that available at the new OLF site, will result in greater safety margins for the aircrews who will benefit from it. As the senior uniformed officer in command of those aircrews, I must do everything in my power to provide them that greater margin of safety at the earliest time possible.” (*Id.* at paragraph 16.) In addition to the fact that training at NALF Fentress is less than optimal, “The Fentress OLF was, and remains, incapable by itself of meeting East Coast FCLP requirements for surging multiple carrier strike groups.”

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determines not to appeal this case, the Navy will withdraw this motion.

<sup>3</sup> Because the issues herein have already been fully argued and briefed by the parties, there should be no need for extensive additional briefing or a hearing on this motion. Therefore, the Navy is requesting an expedited ruling on this motion. Simultaneously with the filing of this motion, the defendants are filing a motion to shorten time for response.

<sup>4</sup> On February 18, 2005, Admiral Fallon left his position as Commander, U.S. Fleet Forces Command to assume duties as Commander, U.S. Pacific Command. He was succeeded as Commander, U.S. Fleet Forces Command by Admiral Nathman. Admiral Nathman stands by the statements in Admiral Fallon’s declaration.

(Id. at paragraph 23.)<sup>5</sup>

### **Argument**

#### **1. The Navy's Intended Actions to Comply with the District Court's Order**

There are two categories of activities that the Navy is confident are not covered by the Permanent Injunction; and the Navy intends to proceed with these activities. It is important, however, that the Navy disclose these activities to the Court in order to distinguish them from related activities that could arguably violate the injunction.

The first category of activities is simply those actions necessary in light of the fact that the Navy already owns some of the land at Site C. These activities would need to proceed, even if the Navy decided not to build an OLF at Site C, and are therefore not “associated with the planning, development, or construction of an OLF.” For example, since the Navy has already purchased several tracts of land in Washington County, it now has certain commitments relating to the land. The Navy had previously committed to entering into leases with the current farmers to allow them to continue farming the land, and additional leases may be necessary. In addition, the Navy has legal obligations to assist with relocation of individuals from whom it has purchased land. The Navy has also concluded that proceeding with the McMullan condemnation action does not violate the injunction, since title to that land has already been transferred to the Navy, and the only remaining issue is the value of the property. In addition to these property issues, the Navy also has an interest in appropriately managing the land it already

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<sup>5</sup> (See also other declarations filed with this Court, including without limitation the declarations of Admiral Zortman and Admiral Cellon.) An additional declaration of Admiral Richard E. Cellon is attached hereto (Exhibit A) concerning activities the Navy was engaged in immediately prior to the issuance of the Permanent Injunction.

owns. To that end, for example, the Navy may enter into discussions with the Albemarle Drainage District to manage the drainage of the farm fields, consistent with the activities that Albemarle Drainage District has undertaken for decades.

The second category of activities that the Navy understands are not enjoined are those actions which are necessary to comply with the District Court's Order to supplement the NEPA analysis. The need for a new OLF (whether at Washington County or elsewhere) is so urgent and critical that the Navy is convinced of the need to immediately initiate the additional NEPA work directed by this Court, notwithstanding the potential pendency of an appeal.<sup>6</sup> It seems clear that this Court did not intend for these activities to be enjoined by the Permanent Injunction, even though they involve additional analysis of Site C. In order to comply with the injunction, the Navy is in the process of assessing what additional environmental analysis may need to be done; and such analysis may include some or all of the following activities: (a) additional site analysis (Order pp. 9-10), (b) analysis of the existing radar data and/or collecting additional radar data (Order pp. 10-11), (c) additional Bird Avoidance Model and Bird Aircraft Strike Hazard (BASH) analysis (Order pp. 11-12), (d) additional review of scientific literature (Order pp. 12-15), (e) additional comparative analysis of the potential BASH issues at Site C and other existing locations with BASH concerns (Order pp. 15-17), (f) additional analysis of cumulative impacts (Order pp. 17-19), (g) additional analysis of possible mitigation measures (Order p. 21), and (h) additional analysis of "surge operations" (Order p. 22). In addition, the Navy has concluded that as part of any additional NEPA analysis, it may conduct a Recommended

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<sup>6</sup> This is without prejudice for the Navy to stop that process if the Fourth Circuit determines that this work is not necessary.

Agricultural Practices Plan at various of the alternative sites, including Site C. Finally, the Navy intends to work cooperatively with other agencies, including the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, in pursuing the avenues necessary to conduct whatever additional NEPA work it deems advisable.

## **2. The Injunction Should be Stayed**

The Navy also desires to proceed simultaneously with additional implementation work at Site C pending a potential appeal. This work should be allowed to continue pending appeal so that the Navy's implementation plans will not be further delayed in the event that the Navy prevails on appeal. In the Navy's pleadings concerning the cross-motions for summary judgment (and in other pleadings before this Court), the Navy has argued that even if the Court issued a declaratory judgment finding a violation of NEPA, it should still not issue a Permanent Injunction, since there would be no immediate or irreparable injury to Plaintiffs or the environment. Those arguments are even more compelling in this motion, since the stay being sought herein is only a stay pending appeal. During that limited time, there will simply be no harm to the environment or to the Plaintiffs if this additional implementation is allowed to proceed. On the other hand, further delay in constructing an OLF will harm Naval aviation readiness. As stated in previous filings, this significant harm outweighs any need for an injunction, especially since neither the plaintiffs nor the environment will be adversely affected. Therefore, the Navy incorporates by reference the previous arguments it has made on this issue; and pursuant to Rule 8(a)(1)(A) of the Federal Rules of Appellate Procedure (FRAP), asks the Court to stay the injunction pending appeal.

### **3. Alternatively, the Injunction Should be Modified Pending Appeal**

Rule 8(a)(1)(A) of the Federal Rules of Appellate Procedure provides for a complete stay of the injunction pending appeal. Rule 8(a)(1)(C) provides for the alternative relief of modifying the injunction pending appeal. Therefore, if the Court does not stay the injunction completely pending appeal, the Navy requests, in the alternative, that the Permanent Injunction be modified pending appeal to allow certain specific actions to move forward. There is legal support for this approach.

Although South Carolina v. Marsh, 866 F.2d 97 (4<sup>th</sup> Cir. 1989) dealt with a preliminary injunction, its rationale is relevant to the Permanent Injunction in this case. In South Carolina, the Fourth Circuit recognized that injunctive relief must be “tailored to restrain no more than what is reasonably required to accomplish its ends” and no “broader than necessary to protect against the environmental risk.” Id. at 100 (internal quotation marks and citations omitted). The Fourth Circuit therefore allowed the agency to proceed with activity that would cause no environmental damage. Id. at 100-101. Similarly, in North Carolina v. City of Virginia Beach, 951 F.2d 596, 600-602 (4<sup>th</sup> Cir. 1991) the agency had not yet complied with NEPA, and the Fourth Circuit said that certain activities in the critical path could take place nevertheless. Furthermore, the Supreme Court has made it clear that not every violation of law requires injunctive relief. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (“[A] federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.”)

The Court should modify the Permanent Injunction pending appeal to allow the following actions specific to Site C to proceed. None of these actions would cause any harm to the

environment or to the Plaintiffs pending appeal, nor would these actions irretrievably commit the Navy to constructing an OLF at Site C if the Navy ultimately determines that this is not the appropriate decision in light of any additional NEPA analysis:

**(A) Wildlife Hazard Assessment and BASH Plan.** During the time the Preliminary Injunction was stayed by the Fourth Circuit, the Navy restarted a contract with the U.S. Department of Agriculture to review the radar analysis to be conducted by Geo-Marine and to conduct a site-specific Wildlife Hazard Assessment and a site-specific BASH plan. Such studies are typically conducted in detail on a site-specific basis after the project decision has been made and a site has been selected. Although the Navy may be collecting some BASH data and addressing some of the BASH issues as part of its additional NEPA work, this will not result in a fully-developed BASH plan specific to Site C. The Wildlife Hazard Assessment and BASH plan will take more than one year to complete, so the Navy has an interest in commencing them as soon as possible, to minimize delays in the project in the event Site C remains the Navy's selected alternative. Since these actions will cause no harm to the environment or to plaintiffs, the Navy should be allowed to proceed with these actions pending appeal.

**(B) Purchases from Willing Sellers.** One of the activities that the Navy has consistently argued should not be enjoined is the purchase of land from willing sellers, including purchases effectuated by condemnation undertaken with the sellers' consent to clear title problems or fix a price. At the Preliminary Injunction stage of this proceeding, the Navy informed the court that several landowners had contacted the Navy



requesting to sell their land to the Navy, and arguing that it was unfair to those landowners to prohibit them from selling their land to the Navy. During the time the Preliminary Injunction was stayed by the Fourth Circuit, the Navy entered into several contracts to purchase land from willing sellers. Some of the closings for those purchases have already taken place. Other landowners have recently contacted the Navy indicating that they are willing to sell; but the negotiations were not concluded as of the time the Permanent Injunction was issued. For the reasons previously argued, the Navy should be allowed to continue negotiating and purchasing land from willing sellers, pending appeal.

**(C) Completing Purchases Currently Under Contract.** One particular owner signed a contract with the Navy to sell his land, but the closing did not take place before the Permanent Injunction was issued. That closing was scheduled for February 24 or 25, 2005, but has now been put on hold because of the Permanent Injunction. The seller is awaiting the proceeds of the sale. Upon information and belief, that seller is also currently attempting to make alternative arrangements for buying replacement property, which is being interfered with because of the Permanent Injunction. Therefore, even if the Navy is prohibited from negotiating with additional landowners, in fairness to this one landowner, the injunction should be modified pending appeal to at least allow this closing.

**(D) Preliminary Land Acquisition Efforts.** Following the stay of the Preliminary Injunction the Navy has begun efforts to conduct property surveys, property appraisals, title searches, relocation surveys, hazardous material surveys and other

related activities that precede the purchase of land. In addition, the Navy needs to renew and/or obtain temporary access easements in order to conduct these activities. These activities cause no permanent damage to the land or its owners; and the Permanent Injunction should be modified to allow these activities to proceed pending appeal.

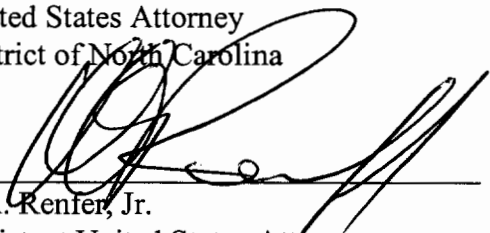
**(E) Planning, Design and Permits.** The Permanent Injunction clearly enjoins “activity associated with the planning” of the OLF at Site C. The work associated with preparing a design involves only engineering and architectural work. The field work associated with design includes additional site investigations, including topographical surveys and soil borings. The contracting effort required to proceed with design work will take two to five months. Once the contract is awarded, the preliminary design work (i.e. work sufficient to apply for permits) will take roughly three to six months; and the permitting process will take approximately six to nine additional months after that. This work will not cause any significant impact to the environment. Therefore, the injunction should be modified to allow the work associated with planning, design and permitting to continue.

### **Conclusion**

For the reasons stated herein, along with the attached declaration, and the declarations, exhibits and arguments previously made in this case, the Navy requests that the Court enter one of the following alternative remedies: (1) stay the Permanent Injunction in this case pending appeal, or (2) modify the Permanent Injunction (pending appeal) to allow the actions outlined above.

Respectfully submitted this 25<sup>th</sup> day of March, 2005.


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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, that on the 25<sup>th</sup> day of March, 2005, I served a true and correct copy of the "MOTION AND MEMORANDUM OF LAW TO STAY, SUSPEND OR MODIFY PERMANENT INJUNCTION PENDING APPEAL" by mailing it via first class mail to counsel at the places and addresses below stated:

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